WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
SEPTEMBER 2015

The cases scheduled for oral argument on **September 17 will be heard at the Grant County Courthouse** (130 W. Maple Street, Lancaster, Wis.) as part of the Supreme Court's *Justice on Wheels* outreach program. Cases scheduled for oral argument on other dates will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Eau Claire
Jefferson
Kenosha
La Crosse
Ozaukee
St. Croix
Waukesha
Winnebago

TUESDAY, SEPTEMBER 8, 2015 (in MADISON)

9:45 a.m.	14AP515-FT	State v. Daniel S. Iverson
10:45 a.m.	12AP2520	Hoffer Properties, LLC v. State of Wisconsin
1:30 p.m.	13AP857-CR	State v. Brett W. Dumstrey

THURSDAY, SEPTEMBER 17, 2015 (in LANCASTER)

9:30 a.m.	13AP2433-CR	State v. Stephen LeMere
11:00 a.m.	13AP907	Kenneth C. Burgraff, Sr. v. Menard, Inc.
2:00 p.m.	14AP2431	St. Croix Co. Dept. of Health and Human Services v. Michael D.

FRIDAY, SEPTEMBER 18, 2015 (in MADISON)

9:45 a.m.	14AP1048	Winnebago County v. Christopher S.
10:45 a.m.	14AP1938	New Richmond News v. City of New Richmond
1:30 p.m.	14AP108-CR	State v. Charles V. Matalonis

TUESDAY, SEPTEMBER 22, 2015 (in MADISON)

9:45 a.m.	13AP613/687	Wis. Pharmacal Co., LLC v. Nebraska Cultures of California, Inc.

Note: The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880.
If your news organization is interested in any camera coverage of *Justice on Wheels* arguments in Grant County, contact media coordinator David Timmerman, editor of the Grant County Herald Independent at (608) 723-2151.
If your news organization is interested in providing any camera coverage of Supreme Court argument in Madison, contact media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 8, 2015
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Wausau), which affirmed a La Crosse County Circuit Court decision, Judge Ramona A. Gonzalez presiding.

2014AP515-FT State v. Iverson

This felony traffic case examines whether a law enforcement officer may conduct a traffic stop when the officer has either a reasonable suspicion or probable cause to believe that a vehicle's occupant has violated a non-traffic forfeiture offense.

Some background: Daniel Iverson moved to suppress evidence and dismiss charges against him for first offense operating a motor vehicle while intoxicated and driving with a prohibited alcohol concentration.

The circuit court granted Iverson's motion, concluding that Trooper Michael Larsen lacked sufficient reasonable suspicion to stop Iverson.

Larsen testified that he was traveling northbound on Rose Street in the city of La Crosse at about 1 a.m. on Sept. 18, 2013, when he observed a silver Jeep. Larsen followed the Jeep and observed it drift within its lane toward the centerline and back, and stop at flashing yellow lights at two separate intersections where there was no observed traffic. Larsen then saw a cigarette butt being thrown from the passenger side of the car.

Larsen testified that he stopped Iverson's vehicle because of the cigarette thrown out of the window. On cross examination, Larsen testified further: "[P]rior to the cigarette butt being thrown out of the vehicle, I didn't feel at that point before that I had the reasonable suspicion to initiate a traffic stop on it. I was [going to] continue to follow the vehicle to observe more information."

The circuit court stated that littering the cigarette butt was not the real reason for the stop, but rather was a pretext to allow the officer to investigate whether the driver was intoxicated and ordered that the evidence be suppressed. The state appealed and the Court of Appeals affirmed.

On Oct. 23, 2014, the state moved for reconsideration asserting that the Court of Appeals' decision in Iverson was inconsistent with the Court of Appeals' nearly simultaneous decision in State v. Qualls, No. 2014AP141-CR (Wis. Ct. App. Dist. II Oct. 8, 2014). The state also cited "relevant legal authority that recognizes the authority of state troopers to stop vehicles based upon a violation of Wis. Stat. § 287.81, which prohibits littering along a state highway."

The Court of Appeals denied the state's motion for reconsideration. The Court of Appeals said the issue is whether an articulable suspicion or probable cause of violation of a forfeiture that is not a violation of a traffic regulation is sufficient justification for a warrantless seizure of a citizen. The Court of Appeals ruled it was not.

The state argues that the Court of Appeals' decision is inconsistent with other case law. The state notes that about the same time the Court of Appeals issued this decision, the Court of Appeals also released Qualls.

The state contends Qualls involved similar issues arising from a vehicle stop after a cigarette butt was thrown from a vehicle window. However, the state says the decision in that case was much different.

Both defendants challenged the traffic stop; Qualls sought to argue that the officer made a mistake of law, and his motion to suppress evidence was denied. A decision by the Supreme Court could help clarify the law in this area.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 8, 2015
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Jefferson County Circuit Court decision, Judge William F. Hue presiding.

2012AP2520 Hoffer Properties v. DOT

This eminent domain case examines the standard as to when the government must pay compensation for eliminating an abutting landowner's right of direct access to a controlled-access highway.

Some background: The state Department of Transportation (DOT) took 0.72 acres of property from Hoffer Properties LLC for a state highway construction project. The highway project involved State Highway 19, which is a controlled-access highway. A controlled-access highway is designed for high-speed traffic, with the traffic flow and entrance and departure points regulated by the DOT. Wis. Stat. § 84.25(2).

The result of the taking was that Hoffer's direct driveway access to State Highway 19 was replaced by alternate access; specifically, the westward extension of an existing public road, Frohling Lane, to reach the Hoffer property.

Hoffer appealed to the trial court on the issue of compensation. DOT moved for partial summary judgment, arguing that the alternate access from Hoffer's property to Highway 19 was reasonable as a matter of law. The trial court granted summary judgment on that issue. Hoffer filed motions in limine and moved to dismiss the action, reserving the right to appeal. The trial court denied the motions in limine, but granted the motion to dismiss the action.

Hoffer appealed, unsuccessfully.

Hoffer contended it was denied reasonable access to Highway 19 when DOT cut off its direct access to the highway in exercising its power of eminent domain. Hoffer argued that the question of whether the alternate access was reasonable should have gone to the jury.

DOT countered that it provided alternate access to the subject property and, thus, the change in access was not compensable as a matter of law. *See* Surety Savings & Loan Ass'n v. State, 54 Wis. 2d 438, 443, 446, 195 N.W.2d 464 (1972) (holding that "there is no compensable taking when direct access to a controlled-access highway is denied, where other access is given or otherwise exists."

The Court of Appeals agreed with the DOT that Surety Savings applied here.

In its petition for review, Hoffer challenges the Court of Appeals' holding that in a loss of access case involving a controlled-access highway, the court need not consider whether the alternate access provided by the DOT is reasonable.

The DOT argues that the Court of Appeals correctly found that the Surety Savings case is outcome-determinative, and that under that case, the provision of any alternate access is – as a matter of law – "reasonable access." That is, the question of the reasonableness of access does not go to the jury because the elimination of direct access to a controlled access highway is an exercise of police power. *See* Wis. Stat. § 84.25(3) (DOT may "regulate, restrict or prohibit access to or departure from [a controlled access highway] as the department deems necessary or desirable").

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 8, 2015
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Waukesha County Circuit Court decision, Judge Donald J. Hassin Jr., presiding.

2013AP857-CR State v. Dumstrey

This drunken driving case examines whether the parking garage of a motorist's apartment building was "curtilage," such that a police officer's entry into the garage was a warrantless and unreasonable search and seizure prohibited by the Fourth Amendment. Curtilage is the area immediately adjacent to a home that harbors "the intimate activity associated with the sanctity of [one's] home and the privacies of life." See Oliver v. United States, 466 U.S. 170, 180 (1984).

Some background: Brett W. Dumstrey was arrested for Operating While Intoxicated (OWI) and ultimately pled guilty to OWI second offense after his motion to suppress evidence was denied.

Officer Paul DeJarlais of the city of Waukesha Police Department testified at the suppression hearing that he was off duty and driving his personal vehicle when he encountered Dumstrey driving in traffic around 11:30 p.m. one night.

The officer said he noticed in his rearview mirror that the defendant's car was approaching at a very high rate of speed. The defendant passed the officer, then slowed down and tailgated another vehicle. The officer said that more than once he observed the defendant swerve into the adjacent lane, accelerate rapidly, and begin tailgating.

The officer called the police department and reported his observations. He then pulled up alongside the defendant at an intersection, made eye contact with the defendant and tried to identify himself as a police officer by displaying his badge and photo identification. The officer told the defendant he had called the police and that the defendant should "wait here." The officer testified the defendant did not respond and stared back with a "blank look on his face." The officer testified that from his training and experience the defendant appeared to be very intoxicated.

While still stopped at the intersection, the officer told Dumstrey to pull over. When the light turned green, the officer went through the intersection and pulled over. Dumstrey stayed in the intersection for almost the entire green light, then went through the intersection and pulled up alongside the officer in the middle of the traffic lane. The officer again instructed Dumstrey to wait. Dumstrey waited a couple of seconds then drove off and turned into a driveway at the Riverwalk Apartments.

The officer followed the vehicle to the apartments, where the defendant drove around the parking lot before entering the parking garage through a remote controlled door. The officer parked his car partway through the door opening so the door could not close and then entered the garage and made contact with the defendant. The officer again identified himself as a police officer and displayed his wallet with his badge.

At that point an on-duty police officer arrived. That officer testified Dumstrey's eyes were glassy and bloodshot, his speech was slurred, and the officer smelled an odor of intoxicants.

The defendant was also swaying back and forth. The defendant refused to perform field sobriety tests and refused to provide a preliminary breath test before being arrested.

The defendant moved to suppress evidence obtained subsequent to the off-duty officer's entrance into the parking garage, arguing that the evidence was obtained in violation of the Fourth Amendment. The circuit court denied the motion. In its remarks from the bench, the circuit court said, "If nothing else we've reached an area of law that's not clear and yet may certainly benefit from further clarity from the Court of Appeals."

Dumstrey pled guilty to second offense OWI and later appealed. The Court of Appeals affirmed.

The Court of Appeals noted that the defendant did not contest the fact that the off-duty officer had reasonable suspicion to stop him. The state conceded that if the garage was curtilage, then the officer improperly entered it to seize the defendant. Thus, the appellate court said the narrow question presented was whether the parking garage was curtilage such that the officer's entry into the garage was a warrantless and unreasonable search and seizure prohibited by the Fourth Amendment.

The appellate court noted that in United States v. Dunn, 480 U.S. 294, 301 (1987), the Supreme Court set forth the following factors that are to be considered when defining the extent of a home's curtilage: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."

The appellate court said for the warrant requirement of the Fourth Amendment to apply, a defendant must have a reasonable expectation of privacy in the location of the search. Whether a person has a reasonable expectation of privacy will depend on whether the person has an actual, subjective expectation of privacy in the area inspected and whether society is willing to recognize such an expectation of privacy as reasonable. See State v. Trecroci, 2001 WI App 126, ¶35, 246 Wis. 2d 261, 630 N.W.2d 555.

The Court of Appeals ultimately concluded that under the totality of the circumstances present in this case, the parking garage was not curtilage. It pointed out that unrefuted testimony showed there were 30 stalls in the parking garage. While the underground garage connected to the defendant's apartment building, and the outside access was limited to tenants and shielded from the general public with entry by remote control, the defendant shared the garage with his landlord and the other tenants who parked there along with their invitees. The appellate court said given the defendant's lack of complete dominion and control and his inability to exclude others, the parking garage was not curtilage of his home. The court also concluded the defendant did not have a reasonable expectation that the common, shared garage would be free from any intrusion.

Dumstrey contends that the state has conceded that if the garage is curtilage, then the off-duty officer improperly entered it to seize the defendant. Dumstrey says perhaps one of the other 29 tenants of the apartment building could have granted the officer permission to enter, but none did so and none was asked to do so. He says if the Court of Appeals' decision is allowed to stand, no resident of an apartment building would have any basis to challenge the admissibility of evidence obtained by officers setting up a permanent camp inside a parking garage like the one here or placing hidden cameras in the hallways of a building that cannot otherwise be accessed by the public.

WISCONSIN SUPREME COURT
THURSDAY, SEPTEMBER 17, 2015
9:30 a.m.
TO BE HEARD AT THE GRANT COUNTY COURTHOUSE
130 W. MAPLE ST., LANCASTER, WIS.

This is a review of a decision of the Wisconsin Court of Appeals, District III (District IV judges presiding), which affirmed a Walworth County Circuit Court decision, Judge Lisa M. Stark (and Kristina M. Bourget) presiding.

2013AP2433-CR State v. LeMere

This child sex assault case examines whether defense counsel has an obligation to advise a defendant prior to a plea that the entry of the plea might ultimately lead to their lifetime commitment as a sexually violent person under Wis. Stat. ch. 980.

Some background: Stephen LeMere was convicted of first-degree sexual assault of a child under the age of 13 for an incident that occurred at his friend's home. LeMere was accused of sexually assaulting a girl while holding a knife to her throat and threatening to kill her if she told any one.

LeMere said he had been drinking and had taken drugs and that he didn't recall much of what had occurred that morning. He said he did recall holding the girl up against a refrigerator with his arm against her chest. He said he did not recall sexually assaulting her.

The state charged LeMere with four offenses: (1) first-degree sexual assault of a child under the age of 13, (2) second-degree reckless endangerment, (3) strangulation, and (4) suffocation. Pursuant to a plea agreement, LeMere pled guilty to the first-degree sexual assault, and the remaining three counts in this case, as well as two battery counts in another case, were dismissed and read in.

During the plea colloquy, the circuit court advised LeMere that if he would be incarcerated as a result of his guilty plea, the state could potentially file a Wis. Stat. ch. 980 petition for his commitment as a sexually violent person at the end of his initial confinement. The court asked twice whether LeMere had any questions or did not understand anything about this matter. LeMere responded on both occasions, "No, ma'am."

The court accepted LeMere's guilty plea. It subsequently sentenced him to 30 years of initial confinement and 15 years of extended supervision.

LeMere filed a post-conviction motion for plea withdrawal, alleging that his counsel had been ineffective for not advising him that he could be subject to a lifetime ch. 980 commitment if he pled guilty, and that his plea was unknowing and involuntary because of that lack of information. LeMere argued that if he had known that by pleading guilty he could be subject to a lifetime ch. 980 commitment, he would not have pled guilty.

LeMere contends that his post-conviction motion alleging these facts was sufficient to merit an evidentiary hearing under Nelson v. State, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and State v. Bentley, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

The circuit court denied the motion without a hearing. It concluded that counsel had no obligation to advise LeMere about the possibility of a lifetime ch. 980 commitment because that was a collateral consequence of his conviction and that LeMere's plea had been knowing and

voluntary, as shown by the discussion the court had with him about the potential for a ch. 980 commitment. The Court of Appeals affirmed.

The Court of Appeals found the issue is governed by existing case law. State v. Myers, 199 Wis. 2d 391, 394, 544 N.W.2d 609 (Ct. App. 1996).

LeMere contends that the U.S. Supreme Court in Padilla v. Kentucky, 599 U.S. 356 (2010) rejected the distinction between direct and collateral consequences in deciding whether trial counsel has an obligation to advise a defendant of a result of a guilty plea. Thus, he believes that the Court of Appeals' reliance on Myers is misplaced because the collateral consequence rationale employed in that decision has been rejected by the Supreme Court in Padilla.

In affirming the circuit court decision, the Court of Appeals explained that there was a clear distinction between the nearly automatic deportation at issue in Padilla and the mere possibility of a ch. 980 commitment, which would require the initiation of a separate proceeding and the state meeting the burden of proving additional facts beyond the fact of conviction.

LeMere asserts that this consequence is similar to the deportation consequence that the Padilla court found to require adequate advice from counsel. Thus, he argues that the Court of Appeals' decision in Myers should be abrogated as either directly or indirectly undermined by Padilla.

The Supreme Court will likely decide in this case whether defense counsel has an obligation to advise a client about the possibility of a lifetime commitment under Wis. Stat. ch. 980, and if so, whether LeMere's counsel was constitutionally ineffective for not doing so here.

WISCONSIN SUPREME COURT
THURSDAY, SEPTEMBER 17, 2015
11 a.m.
TO BE HEARD AT THE GRANT COUNTY COURTHOUSE
130 W. MAPLE ST., LANCASTER, WIS.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reviewed an Eau Claire County Circuit Court decision, Judge Michael A. Schumacher presiding.

2013AP907 Kenneth (and Linda) Burgraff, Sr. v. Menard, Inc.

This is an insurance case arising from an incident that occurred in a loading area at a Menard's store. The Supreme Court reviews several complicated issues, following up on a decision in Blasing v. Zurich American Family Ins. Co., 2014 WI 73, 356 Wis. 2d 63, 850 N.W.2d 138.

Blasing held that an auto insurer had a duty to defend and indemnify Menard after a Menard employee injured Vicki Blasing's foot while loading her pickup truck with lumber. This was so, Blasing reasoned, because Menard was a "permissive user" of Blasing's truck under her auto insurance policy.

The Blasing court, however, left "for another day" any dispute over the relative obligations of Menard's own policy versus its customer's automobile policy.

In the case now being heard, a Menard employee hurt Kenneth Burgraff while using a forklift to load materials onto Burgraff's trailer. The trailer was attached to Burgraff's pickup truck. Burgraff sued Menard for negligence. Menard, per Blasing, tendered its defense to Burgraff's automobile insurer, Millers First Insurance Company. Millers First agreed to provide a defense for Menard, subject to a reservation of rights. Millers First eventually conceded Menard was entitled to coverage under Burgraff's policy.

In the trial court, the parties disagreed as to which insurance was primary: Millers First's $100,000 liability coverage, or Menard's $500,000 "self-insured retention." (Menard had liability coverage with CNA, and this coverage had a liability limit of $500,000 per occurrence. However, the CNA policy also had a $500,000 "self-insured retention." A self-insured retention is a dollar amount specified in a liability insurance policy that must be paid by the insured before the insurance policy will respond to a loss.)

Both Menard's CNA policy and Burgraff's Millers First policy had "other insurance" clauses. Menard argued that CNA's "other insurance" clause made Millers First the primary insurer. Conversely, Millers First argued that its "other insurance" clause made Menard the primary insurer.

The trial court sided with Millers First. It held that, under Millers First's pro rata "other insurance" clause, Millers First's liability was limited to a proportionate percentage of all insurance covering Burgraff's accident. Thus, Millers First would be responsible for 1/6th of any verdict or settlement; i.e., the proportion that Millers First's liability limit ($100,000) bore to the total of all applicable limits ($600,000 – comprised of Millers First's $100,000 limit plus Menard's $500,000 self-insured retention).

The parties also disagreed at the trial court level as to whether Millers First had satisfied its duty to defend.

At mediation, Millers First and Burgraff settled Millers First's 1/6th portion of Burgraff's claim. Under the settlement agreement, Millers First paid Burgraff $40,000. In exchange, Burgraff agreed to fully discharge Millers First and 1/6th of any liability that Menard may have to Burgraff. Menard did not reach any settlement with Burgraff regarding the remaining 5/6th of its liability. Millers First then moved for summary judgment, arguing that it no longer had a duty to defend Menard because it had fully satisfied its duty to pay 1/6th of any verdict or settlement. The trial court agreed.

Menard appealed, with partial success. Menard first argued that its coverage was excess pursuant to CNA's "other insurance" clause. The Court of Appeals rejected this argument, holding that CNA's "other insurance" clause governs CNA's obligations when other insurance is available for a covered loss. The clause does not address the priority of Menard's obligation to pay the self-insured retention amount when other insurance is available.

Menard argued in the alternative that its coverage was excess because, if the Millers First's "other insurance" clause is applicable, Menard's self-insured retention did not constitute "other applicable liability insurance" under that clause. The Court of Appeals disagreed, holding that self-insurance constitutes "other collectible insurance" for purposes of an "other insurance" clause.

Menard next argued to the Court of Appeals that the trial court erroneously concluded Millers First no longer had a duty to defend Menard after it settled its 1/6th share of Burgraff's claim. The Court of Appeals agreed with Menard, holding that the unambiguous policy language required Millers First to provide a defense for Menard until it paid its $100,000 limit of liability.

Both sides petitioned the Supreme Court for review.

In its petition for review, Millers First offers the following issue:

- What is the continuing defense obligation of a concurrent insurer or concurrent self-insurer when a fortuitous insurer has settled and satisfied all of its coverage obligations imposed under an "other insurance" determination for less than the total policy limits?

In its petition for cross-review, Menard offers the following issues:

- Does a self-insured retention constitute "other applicable insurance" for purposes of an "other insurance" clause?
- Where a policy of liability insurance incorporates a self-insured retention endorsement, is the insured entitled to rely on the policy language's "other insurance" clause when there is other applicable insurance?

WISCONSIN SUPREME COURT
THURSDAY, SEPTEMBER 17, 2015
2 p.m.
TO BE HEARD AT THE GRANT COUNTY COURTHOUSE
130 W. MAPLE ST., LANCASTER, WIS.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a St. Croix County Circuit Court decision, Judge Edward F. Vlack presiding.

2014AP2431 St. Croix Co. DHHS v. Michael D.

This case involves the interpretation of the Supreme Court's decision in Waukesha County v. Steven H., 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607 and the interplay of the child in need of protection or services (CHIPS) and termination of parental rights (TPR) notice requirements necessary to properly pursue a TPR proceeding.

The Supreme Court reviews whether a CHIPS-based TPR action is barred if the *last* out-of-home placement order does not comply with the written notice provisions of Wis. Stat. § 48.356, a section of the statutes entitled "duty of a court to warn." The law requires that when a child is placed outside the home, his or her parents must be provided oral and written notice describing any applicable grounds for termination of parental rights as well as the conditions necessary for the child to be returned to the home.

Some background: This case involves the termination of parental rights to Matthew D., who was born in March of 2009. His mother struggles with "cognitive and physical limitations as well as ongoing health concerns" that affect her ability to provide appropriate supervision, care and safety of the child on a consistent basis. Eight days after his birth, Matthew D. was removed into foster care. Less than two months later, he was returned to the mother.

On June 12, 2009, Matthew D. was deemed a CHIPS; the court allowed Matthew D. to remain with the mother, subject to a list of six conditions. The circuit court granted several extensions of this original CHIPS dispositional order.

On Aug. 2, 2011, Matthew D. was removed from his mother's home and placed in a foster home and the court issued a dispositional order for this change of placement. The Aug. 2 dispositional order included the court's finding that placement in the mother's home at that time was contrary to Matthew D.'s welfare because of the mother's "inability to provide appropriate care and supervision, lack of supervision, as well as not capable of maintaining an appropriate environment and could not get him if he was in danger." The court found the county had made reasonable efforts to prevent removal.

The dispositional order was revised, following court hearings, on Oct. 5, 2011 and again on Oct. 11, 2011. The Oct. 11, 2011 revision order explicitly incorporated 14 specific conditions for Matthew D.'s return. The Oct. 11 order also contained a "Notice Concerning Grounds to Terminate Parental Rights," signed by the mother on Oct. 5. That notice specifically warned the mother that her parental rights to Matthew D. could be terminated against her will, based on the ground of continuing CHIPS. The notice also stated the court had informed the mother orally of the applicable grounds for termination of parental rights, and that she had received a copy of the notice.

The Oct. 11 revision order was the first and only written order that incorporated a written warning of all the applicable grounds for which the mother's parental rights could be terminated and the conditions she must meet for Matthew D.'s return, as required by Wis. Stat. §§ 48.356(2) and 48.415(2)(a)1.

On June 18, 2013, the County filed a petition to involuntarily terminate the mother's parental rights to Matthew D., alleging continuing CHIPS, as well as a failure to assume parental responsibility. It is undisputed that between the original dispositional order removing Matthew D. from the mother's home on Aug. 2, 2011 and the filing of the TPR petition on June 18, 2013, the court conducted multiple hearings and issued multiple orders in the CHIPs proceeding. These included the Oct. 11 revised order, as well as two subsequent extension orders filed Dec. 19, 2011 and Sept. 11, 2012, and permanency plan orders filed June 22, 2012 and June 5, 2013.

The court conducted a fact-finding hearing on the TPR petition in December 2013. The mother moved to dismiss, arguing the County had not proven either ground for termination, and (relevant here) asserting the written TPR warnings had not been provided to the mother in the last extension order filed Sept. 11, 2012, as required by § 48.356.

The circuit court denied the mother's motion. The court detailed the entire procedural history of the case and determined "that the notice given to (the mother) was sufficient under § 48.356(2) to inform her that her parental rights were in danger of being terminated and advising her of the conditions necessary for the return of the child."

The circuit court found grounds to terminate the mother's parental rights based on CHIPS, but found the mother did not fail to assume parental responsibility. The court subsequently issued a permanency order on May 15, 2014, noting the mother "continues to struggle with cognitive and physical limitations" that affect her ability to provide the appropriate supervision, care and safety of the child on a consistent basis.

The court terminated the mother's parental rights on May 23, 2014. The mother appealed, and the Court of Appeals reversed.

The Court of Appeals asserts that the oral warnings required by § 48.356(1) were insufficient here. There were seven hearings that required oral warnings of the possibility of TPR and the conditions for return. The mother received oral warnings at only three of those hearings, most recently at the Sept. 6, 2012 extension hearing. She was not provided oral warnings at the subsequent June 5, 2013 permanency plan hearing.

The Court of Appeals, citing Steven H., ruled that failure to include the warnings in the last order meant the TPR had to be dismissed. The county challenges the decision, asserting sufficient notice was provided.

A decision by the Supreme Court is expected to clarify whether Steven H. contains a categorical requirement that the last order contain the necessary notice requirements.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 18, 2015
9:45 a.m.

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Winnebago County Circuit Court, Judge Scott C. Woldt presiding.

2014AP1048 Winnebago Co. v. Christopher S.

This certification examines whether Wis. Stat. § 51.20(1)(ar) is facially unconstitutional on substantive due process grounds because it does not require that a court find an inmate dangerous prior to ordering the inmate civilly committed for treatment and involuntary medication.

Some background: This case arises out of the involuntary commitment and medication of Christopher S., who has been diagnosed as psychotic and paranoid and "schizophrenic paranoid type." At the time the petition for commitment was filed, Christopher was an inmate in the Wisconsin prison system after being sentenced to 20 years for mayhem. The conviction occurred in 2005.

In July of 2012, Christopher was transferred from Fox Lake Correctional Institution to the Wisconsin Resource Center (WRC) after he complained that a cellmate had sexually assaulted him and was trying to establish sexual dominance. Christopher also accused the cellmate of planning to kill him. At the time he was admitted to WRC, Christopher was not prescribed any medication.

In September 2012, Christopher refused an order to eat in the day room and began to posture and loudly indicate that the officer giving him the order had raped him while he was in the military. Christopher was agitated and was moved to segregation to help him gain control of his behavior. In November of 2012, a petition was filed seeking to commit Christopher under § 51.20(1)(ar).

A one-day jury trial took place on Dec. 21, 2012. Two doctors testified for Winnebago County. The jury found Christopher was: (1) mentally ill; (2) a proper subject for treatment and in need of treatment; (3) an inmate in a Wisconsin state prison; (4) appropriate less restrictive forms of treatment were attempted and unsuccessful; and (5) he was fully informed about this treatment needs, the mental health services available to him and his rights and he had an opportunity to discuss them with a licensed physician.

The circuit court entered an order committing Christopher for six months at the WRC along with an order for involuntary medication and treatment. The six-month commitment was extended for another year in June of 2013, and the order for involuntary medication was also extended. The commitment and medication orders were extended again in June of 2014.

After the June 2013 orders were entered, Christopher's counsel filed a motion that principally argued that § 51.20(1)(ar) was facially unconstitutional and unconstitutional as applied. It also argued, in the alternative, that Christopher's trial counsel was ineffective and asked for a Machner hearing. State v. Machner, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App.

1979). The motion did not make any specific argument with respect to the involuntary medication order but merely asked the trial court to vacate it.

Hearings on the motion were held in February and April of 2014. The circuit court did not reach the constitutional question but instead concluded the question was moot. It also concluded that the contention that Christopher did not have effective assistance of counsel was not "even . . . an argument." No ruling was made with respect to the medication order.

Christopher appealed, leading to this certification from the District II Court of Appeals. The county and state argue that the statute is constitutional without requiring a showing of dangerousness.

District II says with regard to treatment of an inmate with psychotropic drugs against his or her will, this appears to be contrary to the U.S. Supreme Court's decision in Washington v. Harper, 494 U.S. 210 (1990) and is likely also contrary to this court's decision in State v. Wood, 2010 WI 17, 323 Wis. 2d 321, 780 N.W.2d 663.

A decision by the Supreme Court may clarify whether substantive due process requires a showing of dangerousness before an inmate may be civilly committed for treatment and medication against his or her will.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 18, 2015
10:45 a.m.

In this bypass of the District III Court of Appeals (headquartered in Wausau), the Supreme Court reviews a decision by St. Croix County Circuit Court, Judge Howard W. Cameron Jr. presiding. A party may ask the Supreme Court to take jurisdiction of an appeal or other pending Court of Appeals' proceeding by filing a petition to bypass pursuant to sec. (Rule) 809.60, Stats. A matter appropriate for bypass usually meets one or more of the criteria for review, sec. (Rule) 809.62(1), Stats., and one the Court feels it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues.

2014AP1938 New Richmond News v. City of New Richmond

This open records case, which bypasses the Court of Appeals, involves a dispute between the *New Richmond News* and the city of New Richmond over redacted information in police reports. A decision by the Supreme Court is expected to affect news organizations and law enforcement agencies statewide.

Some background: The three police reports at issue in this case include two uniform accident reports prepared by officers in compliance with Wis. Stat. § 347.70, and one incident report regarding theft of gasoline. The city of New Richmond Police Department produced the reports in response to the newspaper's public records request but first removed all identifying information concerning the motor vehicle drivers, owners, and witnesses from the accident reports and all identifying information concerning the theft complainant, suspect, and one other person from the incident report.

The city's response letter said that the federal Driver's Privacy Protection Act (DPPA) requires it to redact all personal information it obtained from or was verified with the state Department of Motor Vehicles (DMV).

The DPPA was passed to address safety and security concerns associated with excessive disclosures of personal information held by the state in motor vehicle records. Senne v. Village of Palatine, 695 F.3d 597, 607 (7th Cir. 2012). The DPPA also prohibits "any person" from knowingly obtaining or disclosing personal information from a motor vehicle record for any use not permitted. In addition, it "shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record."

The DPPA includes 14 exceptions which identify circumstances under which personal information may be disclosed. The newspaper relies on three exceptions in this case:

> (1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.
>
> (2) For use in connection with matters of motor vehicle or driver safety and theft. . . .
>
> . . . .
>
> (14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

18 U.S.C. § 1721(b)(1), (2) and (14).

The newspaper filed an enforcement action under Wisconsin's public records law to compel the city to disclose unredacted accident and incident reports held by the police department, which generated those reports using personal information procured from the DMV.

The circuit court granted judgment on the pleadings to the newspaper following briefing and argument. The circuit court concluded that the DPPA does not prohibit the disclosure of law enforcement agency reports containing personal information when that is required by state law.

The lower court found the 7th Circuit's decision in Senne distinguishable since that case did not address the application of the DPPA in connection with a valid request made under a state's public records law.

The circuit court here held that all three records in question fell within exceptions and found that the 14th exception to the DPPA "provides a broad exception for uses specifically authorized under 'the law of the state that holds the record, if such use is related to the operation of a motor vehicle or public safety.'" Finally, the circuit court held that "two of the three requested reports are uniform traffic accident reports, which do not fit the statutory definition of 'personal information.'"

The city and the newspaper jointly petitioned the Supreme Court to take the case and bypass the Court of Appeals. The joint bypass petition says:

> This appeal presents only questions of law, and those questions recur daily throughout Wisconsin. Law enforcement agency reports are routinely and frequently requested by citizens, insurers and other businesses, as well as journalists under the public records law and Wis. Stat. § 346.70(4)(f). The redaction of these records based on uncertainty over the DPPA's application and the potential for municipal liability creates expense for those records custodians who agree with the City's interpretation and frustrates requesters in those jurisdictions. By granting this bypass petition, this court can definitively resolve this growing statewide controversy. Pet. at 15-16.

The city's appellate brief frames the issue as follows:

> May law enforcement redact "personal information" or "highly restricted personal information" from motor vehicle records in response to a public records request where the requester does not specify an applicable exception to access under the federal Driver's Privacy Protection Act[], 18 U.S.C. § 2721(a)?

The newspaper's response brief states the issue as follows:

"Must" the City redact personal information from law enforcement reports "under the federal Driver's Privacy Protection Act," [] based upon federal preemption? See Wis. Stat. Sec. 19.36(1)("Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35(1) . . . .")

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 18, 2015
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Kenosha County Circuit Court decision, Judge Wilbur W. Warren III presiding.

2014AP108-CR State v. Matalonis

This case examines whether a police search of the defendant's home was justified under one of two exceptions to the general rule that warrantless searches and seizures violate the Fourth Amendment.

More specifically, the Supreme Court reviews:

- Whether under the community caretaker doctrine, the officers acted reasonably when, while lawfully inside defendant Charles Matalonis' home, they conducted a warrantless search behind a locked door that had blood on it because of their belief that additional persons may have been injured during a battery that had occurred inside the home.
- Whether under the protective sweep doctrine, officers had a reasonable and articulable suspicion that justified their warrantless sweep of a locked room inside Matalonis' home for people who may have posed a danger to them as they investigated a battery that occurred inside the home.

Matalonis was convicted on one count of manufacturing or delivering THC. The circuit court had denied a suppression motion, concluding that the search of his home was justified under the community caretaker exception. The Court of Appeals concluded that the officers' search did not fall within the community caretaker exception.

Some background: A Kenosha police officer testified at the suppression hearing that in the early morning hours of Jan. 15, 2012, he was dispatched for a medical call at a residence on 45th Street in Kenosha and made contact with Antony Matalonis, the defendant's brother. The officer described Antony as appearing highly intoxicated and battered with the whole right side of his body covered in blood. Antony initially said he had been beat up by four different groups of people outside a bar. He later said he had been beat up by four people outside the bar.

While Antony was taken to the hospital by ambulance, the officer said he followed a trail of blood spatters in the snow outside to the side door of a residence located on Fifth Avenue. The officer testified that when he reached the Fifth Avenue residence he heard two loud bangs coming from inside.

He testified he and another police officer knocked on the door. The defendant answered the door and appeared out of breath but did not appear to be injured. Police told the defendant they had found an injured individual a few houses away, had followed a blood trail to the defendant's residence, and that they needed to enter the residence to make sure no one was injured inside. Police testified the defendant said he had gotten into a fight with his brother and that he lived alone.

The officer testified the defendant let them into the residence and upon entering conducted a protective sweep to make sure no one else was inside who needed medical attention. After finding a few drops of blood here and there, the officer said he found blood smeared all

along the wall leading up the stairs to the second level. Police found blood all over the handrail and glass shards from a broken mirror on the floor.

The officer testified that upstairs in a living area at the top of the stairs he observed various pipes and other smoking utensils used to smoke marijuana. The officer also testified he observed a door secured with a deadbolt with blood spatters on it. On cross-examination he said he also observed the smell of marijuana and the sound of a running fan coming from inside the locked room.

The officer testified that he continued past the locked door into the bathroom to make sure no one was in there and he observed a water bong in the bathroom. He said he then returned to the first level of the house where he asked the defendant where the key to the locked door was. The officer testified he informed the defendant he needed to make sure no one was injured inside the locked room and said if the defendant did not provide the key he would kick the door in. The officer testified that the defendant said the room was full of security cameras for the house.

The officer again asked the defendant for the key to the room, at which point the defendant said he had marijuana plants growing inside the room. The officer obtained the key and upon entering the room found a large marijuana plant growing. The defendant admitted the marijuana plant was his but refused to talk about it further. The officer then asked the defendant about his fight with Antony, at which point the defendant described the fight in more detail.

Following the denial of the motion to suppress, the defendant pled no contest to the manufacture or delivery of THC. He appealed, arguing that the circuit court erred in denying his suppression motion. The Court of Appeals agreed and reversed.

The Court of Appeals concluded that the officers' search did not fall within the community caretaker exception. The state argued that the officers were not required to conclude that Antony was the only person injured and that it was reasonable for the officers to believe another injured person was inside the defendant's home. The Court of Appeals said the absence of contrary evidence alone does not provide an objectively reasonable basis.

Court of Appeals Judge Brian W. Blanchard dissented. Blanchard concluded that the officers did have an objectively reasonable basis to believe that a warrantless, unconsented search of the residence for other injured persons, including the search behind a locked door with blood droplets on it, was necessary to address a serious safety concern and the public interest in the search outweighed the intrusion on the defendant's privacy.

WISCONSIN SUPREME COURT
TUESDAY, SEPTEMBER 22, 2015
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed an Ozaukee County Circuit Court decision, Judge Thomas Wolfgram presiding.

2013AP613/687 WI Pharmacal Co. v. Nebraska Cultures of CA

This insurance case arises out of claims that Nebraska Cultures of California, Inc., supplied the Wisconsin Pharmacal Company, LLC, an incorrect ingredient for incorporation into a dietary supplement to be labeled and sold by a major retailer.

The Supreme Court is expected to clarify the law regarding the application of the "occurrence" and "property damage" requirements in a CGL policy as it relates to claims seeking purely economic damages.

More specifically, the Supreme Court reviews the issues:

- Is the supply of an ingredient that causes a recall of a product incorporating the contractually nonconforming ingredient a claim for "property damage?"
- Does an action that alleges purely contract-based claims seeking purely economic damages as a result of a contractually nonconforming goods constitute an "occurrence?"
- Does the Business Risk exclusion apply to negate coverage?

Some background: Wisconsin Pharmacal Company, LLC, was to supply a feminine health probiotic supplement to be sold under the label of a major retailer. The product called for Lactobacillus rhamnosus A as an ingredient. Pharmacal contacted Nutritional Manufacturing Services, LLC, to locate a supplier and to manufacture the supplement tablets. Nutritional Manufacturing contacted Nebraska Cultures to locate the rhamnosus, and Nebraska Cultures arranged with Jeneil Biotech, Inc. to supply it.

Pharmacal ordered a substantial quantity of rhamnosus tablets from Nutritional Manufacturing. Nutritional Manufacturing purchased the rhamnosus from Nebraska Cultures to manufacture the tablets, and the certificate of analysis representing that the probiotic was in fact rhamnosus "appeared to have originated" from Jeneil. Nutritional Manufacturing used the probiotic to manufacture the chewable tablets for Pharmacal, which in turn sold the tablets to the retailer as part of the daily probiotic feminine supplement. The retailer later informed Pharmacal that the supplement tablets did not in fact contain rhamnosus but instead contained Lactobacillus. Pharmacal confirmed this fact through independent testing. The retailer recalled Pharmacal's daily probiotic feminine supplement.

Nutritional Manufacturing assigned its claims to Pharmacal. Pharmacal sued Nebraska Cultures and its insurer, Evanston Insurance Co., and Jeneil, and its insurer, The Netherlands Insurance Co. Pharmacal alleged various tort and contract causes of action.

In response to motions to dismiss, the circuit court dismissed all of Pharmacal's causes of action against Nebraska Cultures; all of Pharmacal's causes of action against Jeneil; all of Nutritional Manufacturing's causes of action against Jeneil; and Nutritional Manufacturing's tort and statutory causes of action against Nebraska Cultures. This left Nutritional Manufacturing's contract claims against Nebraska Cultures, which included claims for breach of contract, breach

of duty of good faith and fair dealing, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, breach of implied warranty under the Uniform Commercial Code, and Nebraska Culture's and Jeneil's cross-claims for contribution or indemnification.

The insurers successfully moved to bifurcate and stay proceedings pending a coverage decision. The insurers then moved for summary judgment on coverage. The circuit court deferred deciding the summary judgment motion and gave the parties 60 days to conduct discovery. Ultimately, the circuit court did grant summary judgment in favor of the insurers.

The circuit court found there was no coverage. It concluded there was no damage to property other than the integrated product into which the mistaken ingredient had been incorporated and that this did not constitute property damage other than to the product itself. Accordingly, the circuit court found there was no "occurrence."

The lower court went on to say that even if there were an initial grant of coverage, the impaired property and recall exclusions in the policies would preclude coverage. Finally, the lower court found that "under the facts of this particular case . . . there's no duty to defend."

Jeneil and Nebraska Cultures appealed. The Court of Appeals, with Judge Paul F. Reilly dissenting, reversed and remanded. Nebraska Cultures' insurers, Evanston Insurance Company and The Netherlands Insurance Company, jointly appealed to the Supreme Court.